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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5485

ROBERT JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The order "adjudging Robert Johnson in contempt and providing punishment, etc." issued by Judge Marshall Perry of the Circuit Court of Grenada County, Mississippi, on January 27, 1969, is unreported and is printed at Single Appendix (A.) 28. The opinion of the Supreme Court of Mississippi dated March 9, 1970, affirming Johnson's conviction as modified, is reported at 233 So.2d 116 and is printed at A. 46. The judgment of the Supreme Court of Mississippi denying Johnson's petition for rehearing was entered April 6, 1970, and is printed at A. 55.

JURISDICTION

The judgment (A. 45) and opinion (A. 46) of the Supreme Court of Mississippi were rendered on March 9, 1970. Petitioner filed a timely petition for rehearing in that court which was denied on April 6, 1970 (A. 55). The petition for a writ of certiorari was filed on July 2, 1970, and granted on January 11, 1971 (A. 62). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

1. Did the Mississippi trial court violate petitioner's right to due process by summarily convicting him of criminal contempt

> —where the court, although not immediately invoking summary procedure, some two years later denied petitioner the opportunity to assert legal or factual defenses to the contempt charge;
>
> —where the actual use by the court of an alternative remedy (ouster from the courtroom) made summary proceedings unnecessary;

—where all necessity for a factual hearing had not been excluded; and

—where petitioner's one remark to courtroom sheriffs did not constitute a "flagrant defiance" of the court.

2. Did the failure of the trial judge—whose role as dispassionate jurist was entangled with his roles as the official who initiated the prosecution, and as a defendant in a law suit brought by petitioner—to disqualify himself or even to hear petitioner's motion to recuse deprive "the contempt proceeding of the appearance of evenhanded justice which is at the core of due process"?

STATEMENT

On January 27, 1969, Petitioner, Robert Johnson, without a hearing, was summarily convicted of criminal contempt by Judge Marshall Perry of the Circuit Court of Grenada County, Mississippi, for a remark Johnson allegedly made more than two years earlier in Judge Perry's courtroom (A. 28). Judge Perry sentenced Johnson to four months' imprisonment (A. 29). This sentence was reduced by the Supreme Court of Mississippi to the maximum sentence (one month) authorized by Mississippi statute for "contempt of the court while sitting."[1] On April 27, 1970, the Supreme Court of Mississippi granted Johnson's motion for stay of judgment pending disposition in this Court of the petition for a writ of certiorari (A. 55).

Although Judge Perry had twice scheduled a show-cause hearing on the contempt charge, at Johnson's conviction and sentencing he was denied, over objection (A. 39-43), any opportunity

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[1] Miss. Code 1942, § 1656 provides in part: "The Supreme, circuit, chancery and county courts shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed one hundred dollars for each offense, nor shall the imprisonment continue longer than thirty days."

—to be heard on the issue of his guilt or innocence;

—to be heard on his previously filed motion (A. 6) that Judge Perry recuse himself from judging the contempt charge;

—to assert legal defenses to the show-cause petition (A. 3) citing him for contempt; or

—to present facts in mitigation of sentence.

The alleged contempt occurred on January 23, 1967, under the following circumstances.

At the 9 a.m. opening of Judge Perry's court on January 23, 1967 (the first day of the January term), prospective jurors occupied the rows of benches nearest the courtroom doors, a section normally reserved for the public (A. 3, 15). The arrangement of the courtroom was such that a direct route from the doors to the remaining seats reserved for the public and for defendants in pending cases involved walking in front of the prospective jurors (A. 15). Judge Perry, to forestall persons from taking that path, announced at the opening of court (9 a.m.) that those entering the courtroom should use an aisle running behind the jurors to reach the remaining seats (A. 3, 15, 28).

Around 9:05 or 9:10 a.m. (A. 3, 28), subsequent to Judge Perry's announcement, Johnson entered through the courtroom doors and began walking across the room to sit with some persons he knew, namely, other civil rights workers present (like Johnson) as defendants in pending cases[2] (A. 15-16). As he did so, he passed in front of the jurors seated near the doors (A. 3, 16).

At that point, Deputy Sheriff Aaron Lott apprehended Johnson and instructed him to turn around and walk to the rear of the courtroom (A. 3, 16, 28). According to the show-cause petition citing Johnson for contempt, Sher-

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[2]The charges pending against Johnson were subsequently dismissed (A. 38). At that time, Johnson was a 20-year-old civil rights worker employed as a staff member of the Southern Christian Leadership Conference (A. 6, 14).

iff Suggs Ingram immediately joined Deputy Lott and also ordered Johnson to the rear of the courtroom (A. 3). Thereupon, the petition continues, "Robert Johnson said in a loud and offensive voice, 'what the hell do you mean go around' " (A. 3).

By contrast, Johnson has asserted that not having heard Judge Perry's earlier announcement, he simply asked for an explanation of the orders of the deputy and sheriff (A. 16). Johnson was never given a hearing at which he could have called witnesses or otherwise substantiated his version of the events, and there is no transcript of the proceedings in Judge Perry's courtroom on January 23, 1967.

Differing and contradictory versions of the events which followed Johnson's alleged remark appear in the State's own documents included in the "record" which the Supreme Court of Mississippi considered in affirming the contempt conviction. These versions appear in the State's show-cause petition citing Johnson for contempt which was signed January 24, 1967, *the day following the events,* by both the Grenada County prosecuting attorney and the local district attorney (A. 3-4), and in Judge Perry's contempt judgment of January 27, 1969, *first prepared two years after the events* (A. 28-29):

> 1. The State's 1967 show-cause petition reports that following Johnson's remark, Sheriff Ingram and Deputy Sheriff Howard Hayward seized Johnson "and immediately carried him before the Circuit Judge, Marshall Perry, *and related to the Judge what had transpired.*" (Emphasis added.)[3] Differing

[3]Sheriff Suggs Ingram, one of the officers who "related to the Judge what had transpired," was a defendant in a 1966 civil rights suit in which Johnson was chief witness for the plaintiffs (see Rebuttal Brief for Appellant Johnson at 11, *Johnson v. State,* 233 So.2d 116 (Miss. 1970), part of the certified record p eviously filed herein with the petition for certiorari). In that action, *Cunningham v. Ingram,* 12 Race Rel. L. R. 53 (N.D. Miss. No. WC 6630, 1966), the U.S. District Court for the Northern District of Mississippi found that the defendants had caused "arrests and other acts . . . which, in some

sharply, Judge Perry's 1969 contempt order declares that he learned of Johnson's one remark to Sheriff Ingram and Deputy Lott near the courtroom doors not because the officers repeated it to him at the bench but because he overheard it himself.

2. The 1967 show-cause petition states that after the officers had brought Johnson to the bench and had "related to the Judge what had transpired", Judge Perry "*then* instructed the Sheriff to arrest Robert Johnson for contempt of Court : . . ." (Emphasis added.) By contrast, Judge Perry's 1969 contempt order avers that "on order of the Court," the sheriff and a deputy "arrested said Johnson and brought him before the Bench."

3. The 1967 show-cause petition states that Judge Perry, having "instructed the Sheriff to arrest Robert Johnson for contempt of Court", then "requested that the District Attorney and the County Prosecuting Attorney file a petition citing and requiring Robert Johnson *to show cause why he should not be punished for a contempt* of the Circuit Court of Grenada County, Mississippi." (Emphasis added.) Ignoring this indisputable fact, Judge Perry's contempt order, first prepared in 1969, recites that the Court at that time "advised said defendant *that he was in contempt* and would be sentenced later during the court term." (Emphasis added.)

4. Judge Perry's 1969 contempt order adds that after Johnson's remark to Sheriff Ingram and Deputy Lott, Johnson "continued to stand and look around over the room, disrupting the court proceedings."

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instances, infringed upon" plaintiffs' Constitutional rights, and therefore enjoined Sheriff Ingram and other defendants from "arresting, jailing, prosecuting, punishing, threatening, intimidating, deterring, blocking or in any way interfering with plaintiffs or the members of the class they represent [Negro citizens of Grenada County] while they are engaged in exercising rights guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution . . . ." In addition to Sheriff Ingram, the defendants included the Grenada County prosecuting attorney, Jim McRae Criss, Esq., who signed the 1967 show-cause contempt petition on behalf of the State.

> The 1967 show-cause petition, prepared the day after the events, does not report any such alleged happening.

Judge Perry's 1969 contempt order does not attempt to resolve the conflict between his recollection of the facts and the State's report contained in the 1967 show-cause petition, nor does Judge Perry mention in the contempt judgment that he had ordered preparation of the petition. As related further below, Judge Perry denied Johnson and his attorneys an opportunity, both on January 23, 1967, and thereafter, to rebut the criminal charges asserted against him.

After his arrest, Johnson was removed from the courtroom (A. 16). When Johnson's then attorney, L. Lackey Rowe, Jr., Esq., attempted on behalf of Johnson to object to the court's action, Judge Perry ordered Rowe arrested and charged him with criminal contempt.[4] On January 31, 1967, the United States District Court for the Northern District of Mississippi issued a temporary restraining order enjoining trial of the contempt charge, and said charge has never been further prosecuted (*Rowe v. Mississippi*, N.D. Miss. No. WC 676, 1967).

On January 24, 1967, the day after the alleged comment was made, Judge Perry ordered that process issue against Johnson, directing him to appear on February 1, 1967, "to show cause, if any he can, why he should not be found in Contempt . . . ." (A. 5). A summons to appear on that date was subsequently served on Johnson (A. 16). Judge Perry's instruction to prepare the show-cause petition, his scheduling of the original show-cause hearing, and his subsequent rescheduling of that hearing make clear that Johnson had not been convicted of contempt at the time of his ouster from Judge Perry's courtroom on January 23, 1967.

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[4] See Rebuttal Brief for Appellant Johnson at 8, *Johnson v. State*, *supra* note 3.

On January 27, 1967, Johnson, through his then attorney, filed a motion that Judge Perry disqualify himself from the show-cause hearing scheduled for February 1. (A. 6). The motion asserted that otherwise, Johnson would be deprived of his right to a fair and impartial trial under the Fourteenth Amendment, in that (i) "Judge Perry is personally prejudiced against the defendant", "against the civil rights organizations he represents," and "against the lawyers' organization defending Mr. Johnson, namely the Lawyers' Committee For Civil Rights Under Law," and (ii) "Judge Perry witnessed the arrest of the defendant in his courtroom" and had ordered preparation of a petition citing Johnson for the alleged contempt.

Two affidavits were attached to the motion as support for the allegation of personal prejudice on the part of Judge Perry:

> —According to the sworn affidavit (A. 7) of B. E. Bergesen III, Esq., a member of the District of Columbia bar and then an attorney for the Lawyers' Committee in Jackson, Mississippi, Judge Perry in substance made the following statements while charging a grand jury in his courtroom on January 23, 1967, the same day on which he ordered the arrest of Johnson for contempt: that the Lawyers' Committee was one group of "outside lawyers" "who have come into the state . . . to assist and aid pro-socialist and pro-communist agitators"; that said lawyers "have engaged in the unauthorized practice of law;" and "have openly, illegally, and notoriously solicited business . . ."; that "if you treat them courteously then they only take advantage of you"; and that "most of these lawyers seem to have Washington or New York addresses, and about 90% are Jews."
>
> —According to the sworn affidavit (A. 10) of Peter G. Eikenberry, Esq., a member of the New York bar, Judge Perry in substance made the following remarks while charging a grand jury in his courtroom on July 25, 1966, six months previously: that

> "the people with the so-called march are looking for places to cause violence and there is an ugly communistic overtone to the whole situation"; that "when I was a boy on the farm, if I saw a snake I took a club, hit it in the head and killed it"; and that "these people don't know, but they will find out, that there is no soft spot in Grenada".

No hearing was ever held on Johnson's motion that Judge Perry recuse himself from the contempt proceeding.

On February 1, 1967, the scheduled date for the show-cause contempt hearing, Johnson's attorneys filed a petition for removal of the contempt proceeding (pursuant to 28 U.S.C. §§ 1443(1) and 1446) to the United States District Court for the Northern District of Mississippi, alleging violations of Johnson's rights under federal statutes and the United States Constitution (A. 14). The removal petition, verified by Johnson, stated (A. 16) that Judge Perry's rule (announced at the opening of court on January 23, 1967) forbidding persons from walking in front of the prospective jurors "was upon information and belief, enforced only against Negroes and not against white persons."[5] In addition, the removal petition asserted (A. 19) that Johnson could not obtain a fair and impartial trial on the contempt charge, for the same reasons detailed in the motion to recuse Judge Perry (A. 6).

By order dated November 14, 1968, the U.S. District Court remanded Johnson's contempt prosecution to Judge Perry's court on the authority of *Greenwood v. Peacock*, 384 U.S. 808 (1966), after finding that "the petitioner

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[5]The removal petition also states (A. 14-15) that Johnson's civil rights activities as a staff member of the Southern Christian Leadership Conference were "well-known" to Sheriff Ingram, his deputy sheriffs, the Grenada County prosecuting attorney, Jim McRae Criss, Esq., who signed the show-cause petition (A. 3), and, "upon information and belief," to Judge Perry and to the Grenada County district attorney, Chatwin M. Jackson, Esq., who also signed the show-cause petition.

[Johnson] has adequate means available [in the state courts] to prevent encroachment of his federally guaranteed rights" (A. 22-23). Thereafter Judge Perry required that a $1,000 bond be posted guaranteeing Johnson's appearance on January 27, 1969 (the first day of the January term) to answer to the contempt charge (A. 24, 29).

On January 22, 1969, Johnson and certain other persons filed suit in the United States District Court for the Northern District of Mississippi to enjoin trials of Negroes or women in the Circuit Court of Grenada County until such time as Negroes and women were not systematically excluded from Grenada County juries in violation of the United States Constitution (*Johnson v. Gibbs*, N.D. Miss. No. WC 69-6 S, 1969). Judge Perry was named a defendant in this action and served with process on January 23, 1969.[6] A hearing on Johnson's complaint of jury discrimination was held on January 24, 1969, and on January 25, 1969, the District Court, finding that the Grenada County juries were "illegal and violative of the constitutional rights of the plaintiffs . . .," issued a preliminary injunction enjoining Judge Perry and the other defendants "from engaging in any act or practice which involves or results in discrimination by reason of race, color, or sex . . ." in jury selections.

On January 24, 1969, summons issued directing Johnson to appear in Judge Perry's courtroom on January 27, 1969, to show cause why he should not be punished for contempt of court (A. 39). This was the second scheduling of a hearing on the contempt charge made against Johnson in the show-cause petition (dated January 24, 1967).

At 9 a.m. on January 27, 1969, Johnson and his then attorney, Martha M. Wood, Esq., appeared before Judge Perry.[7] Denying Johnson's request for a hearing (A. 40),

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[6] See Rebuttal Brief for Appellant Johnson at 10, *Johnson v. State*, *supra* note 3; A. 39.

[7] There is no transcript of the proceedings before Judge Perry on January 27, 1969.

Judge Perry read the order (A. 28) adjudging Johnson in criminal contempt and sentencing him to four months' imprisonment.[8] Bail, pending appeal, was set at $2,000. Judge Perry denied motions to reduce the sentence to one month, the statutory maximum under Mississippi law for "contempt of the court while sitting,"[9] and to reduce bail to $300, the statutory maximum under Mississippi law for "appeal from judgment for contempt"[10] (A. 40-41).

At a second appearance before Judge Perry at 11 a.m. the same morning, Miss Wood renewed her request for a hearing on the contempt charge, stating that had such a hearing been granted she would have (i) proven Johnson's innocence on the merits, in part by calling as witnesses spectators who had been present in Judge Perry's courtroom on January 23, 1967; (ii) presented testimony and documentary evidence in support of the motion to recuse Judge Perry, on the grounds that a contempt charge should not be tried by the judge in whose courtroom the contempt allegedly occurred, and that Judge Perry could not provide Johnson with a fair and impartial trial; (iii) demurred to the show-cause petition on legal grounds; and (iv) proven facts in mitigation of sentence, if Johnson were nonetheless found guilty. (A. 41-42). Judge Perry refused to sign a bill of exceptions to be prepared by Miss Wood (A. 43).

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[8]Judge Perry's 1969 contempt order does not impose sentence on Johnson pursuant to a prior conviction. The 1969 order, after stating that "this Court *now* has jurisdiction of both the defendant and the subject matter," declares that "it is hereby ordered and adjudged that said Robert Johnson . . . is *hereby* adjudged in criminal contempt . . ." (A. 29; emphasis added)—contempt which had allegedly occurred two years previously.

[9]Miss. Code 1942, § 1656 (see note 1, *supra*). Johnson's sentence was modified by the Supreme Court of Mississippi to one month's imprisonment.

[10]Miss. Code 1942, § 1152. Bail was subsequently reduced to $300 by the Supreme Court of Mississippi (A. 30).

In the bill of exceptions subsequently prepared by Miss Wood and also signed by two members of the Mississippi bar who personally had been present in Judge Perry's court on January 27, 1969, Miss Wood asserted that in denying her motion for a hearing at the 9 a.m. proceeding on January 27, 1969, "Judge Perry stated that he had intended to give [Johnson] a hearing on the contempt charge . . ., but that since [Johnson] had the audacity to go to federal court (and whether Judge Perry meant by that the original removal order or the affirmative jury suit or both is not clear), he was not going to give him any hearing." (A. 40).

On February 6, 1969, only ten days after summarily adjudging Johnson in criminal contempt, Judge Perry summarily adjudged Miss Wood and the two attorneys who signed the bill of exceptions in criminal contempt, sentencing each to sixty days' imprisonment and a $300 fine. Denying that he had made the statement referred to in the above paragraph, Judge Perry declared that the said bill of exceptions (A. 38) is "filled with calculated, deliberate falsehoods and mis-statements of fact and is grossly disrespectful to this Court and contains language that no attorney should be permitted to use in an instrument filed in Circuit Court" (A. 56). On appeal, the Supreme Court of Mississippi reversed the contempt conviction as to each of the three attorneys, finding that since "the contempt, if any, in the case before us is constructive" and not "direct," Judge Perry's failure to give notice (two of the attorneys were not even present at the sentencing), to specify the grounds which constituted the alleged contempt, or to hold a hearing at which the accused could defend against the charges made his contempt judgment "a nullity". *Wood v. State*, 227 So.2d 288, 290-291 (Miss. 1969).

In his appeal brief, Johnson argued the constitutional issues raised herein, asserting (among other claims) that his conviction and sentencing without a hearing and by the same judge in whose courtroom the contempt allegedly occurred violated the due process clause of the United

States Constitution.[11] In its brief below, the State admitted that Judge Perry "apparently intended to give [Johnson] a hearing",[12] but argued that since the contempt was "direct," no hearing was required under the United States Constitution. The State conceded that the sentence imposed on Johnson by Judge Perry exceeded the statutory maximum.[13]

On March 9, 1970, the Supreme Court of Mississippi affirmed Johnson's conviction as modified (one month's imprisonment). That court explicitly declared that it simply assumed "the statement of the substantive facts set out in the [1969] judgment of the trial court," prepared two years after the event, "as true and correct."[14] On this assumption, the court held that it was not error for Judge Perry to have imposed punishment without giving Johnson an opportunity to be heard on the issues of whether he had committed contempt, of whether any contempt he committed was "direct" or "constructive," and of whether the court could ensure him a fair and impartial trial, in that "the facts set out in the [1969] judgment of the circuit court are sufficient to show that [Johnson] was guilty of direct contempt of that court . . .,"[15] Johnson's petition for rehearing was denied on April 6, 1970.

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[11] Brief for Appellant Johnson at 6-8, 12-15, *Johnson v. State, supra* (part of the certified record previously filed herein with the petition for certiorari).

[12] Brief for Appellee at 1, 8-9, 12-14, *Johnson v. State, supra* (part of the certified record previously filed herein with the petition for certiorari).

[13] *Id.*, at 21-22.

[14] *Johnson v. State, supra,* 233 So.2d at 119 (A. 49).

[15] *Johnson v. State, supra,* 233 So.2d at 122 (A. 54).

SUMMARY OF ARGUMENT

I. The actions below of the trial judge—who invoked the summary contempt power not only against Johnson but also against an attorney properly representing him and two other attorneys who merely signed the bill of exceptions—dramatically and illuminatingly demonstrate the dangers of permitting deviation from normal due process rules in contempt proceedings. Because of its long standing recognition of the potential abuse of summary contempt power, this Court has made clear that contempt proceedings may deviate from such fundamental guarantees as the right to a hearing only if the following four strict conditions have been met. None of these conditions were met here.

(A) *Summary contempt convictions must be imposed instantly.* Since Judge Perry did not impose summary punishment at the time the alleged contemptuous remark was made (January 23, 1967), the use of summary proceedings against Johnson more than two years later (January 27, 1969) violated due process.

(B) *Summary contempt proceedings must be reserved for cases where alternative remedies would be unavailing.* Since Johnson's ouster from Judge Perry's courtroom on January 23, 1967 terminated any momentary interruption in the trial court's business, the subsequent imposition of summary punishment some two years later violated due process.

(C) *Summary contempt proceedings must be reserved for cases where all necessity for a factual hearing has been excluded.* Since Judge Perry, according to the State's own documents prepared at the time, did not personally observe the alleged contemptuous act, a hearing was necessary on Johnson's denial that he committed contempt. Moreover, even if the judge himself had heard the remark, the failure to grant Johnson an opportunity to show that Judge Perry misunderstood or misheard what was said violated due process.

(D) *Summary contempt proceedings must be reserved for exceptional circumstances constituting flagrant defiance of the court.* Johnson's one comment directed at sheriffs present in the courtroom did not constitute such a threat to the court's business, and consequently the imposition of summary punishment violated due process.

II. Judge Perry's refusal to hear Johnson's timely motion, supported by affidavits from two attorneys, that the judge recuse himself on grounds including personal bias infected Johnson's conviction with constitutional error. More important, the failure of the trial judge—who was the official initiating Johnson's prosecution, and who was defendant in an unrelated law suit brought by Johnson—to disqualify himself from trying the contempt charge deprived "the contempt proceeding of the appearance of evenhanded justice which is at the core of due process."

ARGUMENT

I. THE RIGHT TO A HEARING

In a long line of cases, this Court has warned that to permit deviation from normal due process rules in contempt proceedings would leave the contempt power peculiarly susceptible to abuse.[16] The actions below of the trial judge—who invoked the summary contempt power not only against Johnson but also against an attorney properly representing him and two other attorneys who merely signed the bill of exceptions—dramatically and illuminatingly demonstrate the

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[16] *Ex Parte Terry*, 128 U.S. 289, 313 (1888); *Cooke v. United States*, 267 U.S. 517, 539 (1925) ("care is needed to avoid arbitrary or oppressive" use of contempt power); *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Harris v. United States*, 382 U.S. 162, 164 (1965) (this Court has "long demonstrated" its concern over abuse of the contempt power); *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (this Court "has long recognized the potential for abuse in exercising the summary power to imprison for contempt . . .").

dangers of permitting such deviation from due process protections, and illustrate why even in its earliest decisions this Court stood cautious of exposing persons to summary contempt proceedings.

Pointing out in *Bloom v. Illinois, supra,* that in modern times "procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases" (391 U.S. at 207), this Court concluded that the oft-suggested justification for summary contempt power (vindication of a judge's dignity or authority) cannot outbalance the right of the accused to "all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice" (391 U.S. at 208). Most recently, unanimously reversing a state court summary contempt conviction in *Mayberry v. Pennsylvania,* 39 U.S.L. Week 4133 (Jan. 20, 1971), this Court re-emphasized the traditional due process guarantee of a public trial as applicable to all contempt proceedings, except, perhaps, in that "narrowly limited category of contempts"[17] where unusual circumstances made it necessary for the trial judge observing contemptuous conduct to act instantly by criminal conviction rather than by some alternative remedy.

The opportunity to defend against criminal charges clearly constitutes one fundamental guarantee of the Fourteenth Amendment. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system

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[17] The early decisions in *Ex Parte Terry, supra,* and *Cooke v. United States, supra,* have been held by this Court to recognize only a "narrowly limited category of contempts" which can be punished summarily. *In re Oliver,* 333 U.S. 257, 275 (1948); *Harris v. United States, supra,* 382 U.S. at 165. Under *Cooke,* a contempt defendant may be denied due process protections only if his contemptuous conduct created such "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if not "instantly suppressed and punished, demoralization of the court's authority" would have followed (267 U.S. at 536).

of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver, supra,* 333 U.S. at 273. One charged with contempt may be denied these due process protections, if at all, only if each of the following four strict conditions have been met. Not one of these conditions was met below, and hence Johnson's conviction must be reversed.

A. Summary contempt convictions must be imposed instantly.

This Court has repeatedly linked summary contempt procedures to an "immediate" necessity for "instant" vindication of the court's dignity. *Ex Parte Terry, supra,* 128 U.S. at 310 ("the ends of justice demanded immediate action"); *Cooke v. United States, supra,* 267 U.S. at 536 (only reason for denying due process hearing seen as "need for immediate penal vindication of the dignity of the court"); *In re Oliver, supra,* 333 U.S. at 275 (early decisions found applicable only where "immediate" punishment is essential). Most recently, in *Mayberry v. Pennsylvania, supra,* the opinion of the Court confirmed that summary contempt power cannot be employed (in the case of non-lawyers) except as *instant* punishment for severe contemptuous conduct such as "brazen efforts to denounce, insult, and slander the court and to paralyze the trial":

> As these separate acts or outbursts took place, . . . to keep order in the courtroom . . . [the trial judge] could, with propriety, have instantly acted, holding petitioner in contempt, or excluding him from the courtroom, or otherwise insulating his vulgarity from the courtroom.

And again:

> Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved.

Since Judge Perry did not impose summary punishment at the time the contemptuous remark was made (January 23, 1967), nor even during the period prior to Johnson's filing the removal action (February 1, 1967), clearly, there was no immediate need for withholding from Johnson normal due process rights.[18] Where "swiftness was not a prerequisite of justice", summary contempt procedures violate the Constitution. *Harris v. United States, supra,* 382 U.S. at 164.[19] "Instant" action does not include action two years later.

B. Summary contempt proceedings must be reserved for cases where alternative remedies would be unavailing.

Any momentary interruption in the trial court's selection of prospective jurors for the January 1967 term caused by the sheriffs' apprehending of Johnson and taking him to the bench was cured by Johnson's ouster from the courtroom. Once Johnson was removed, there was no necessity for Judge Perry to employ *summary* conviction procedures. The

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[18] As one commentator has noted, "if the judge can wait until the end of the trial, it is clear there is no 'need for speed' in punishment, and a hearing ought to be afforded if those charged with contempt wish to have one." Dobbs, "Contempt of Court: A Survey," 56 Cornell L. Rev. 183 (1971), at 229.

[19] In that case, defendant Harris refused to answer questions before a grand jury. Both Harris and the jurors were brought into the courtroom, where Harris again declined to answer the same question repeated by the judge. The judge, denying Harris the right to a hearing at which he would be permitted to call witnesses, found him guilty of criminal contempt, and imposed sentence. Although the contemptuous conduct had occurred in open court and in response to the judge's inquiries, this Court ruled that the contempt "was far outside the narrow category" for summary procedure (382 U.S. at 165)—*i.e.*, instant punishment was not thought necessary to vindicate the judge's dignity before the grand jury and others present in the courtroom. This Court said that "delay necessary for a hearing would not imperil the grand jury proceedings" (382 U.S. at 164), pointing out that "a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice" (382 U.S. at 167).

limit of the authority to punish for contempt is the "least possible power adequate to the end proposed." *Harris v. United States, supra,* 382 U.S. at 165, quoting *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 231 (1821). Under these facts, explusion of Johnson from the courtroom achieved the goal of conducting court proceedings without interruption, and the subsequent imposition of summary punishment thus violated the Fourteenth Amendment.

Potential jurors, witnesses, or persons accused of crime, who may have had little contact with the judicial process, may on occasion understandably be nervous or fearful, or perhaps even exuberant, in the courtroom. To subject such persons to summary proceedings carrying criminal penalties on the basis of one off-hand remark—without prior warning, without hearing or an opportunity to give their version of the facts or to explain their intent—does not engender that genuine respect "which alone can lend true dignity to our judicial establishment."[20] Instead, the denial of normal due process guarantees (including denial of an opportunity to be heard) in prosecuting a relatively trivial offense simply debases whatever deterrent value the summary contempt power may have.[21]

A trial judge faced with courtroom disruption has available the "arsenal of authority" described in *Illinois v. Allen,* 397 U.S. 337 (1970), including exclusion from the courtroom. Summary contempt power, being liable to such potential abuse, can be selected from that arsenal only when alternative remedies would be unavailing. *Harris v. United States, supra,* 382 U.S. at 165.

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[20] *Bloom v. Illinois, supra,* 391 U.S. at 208.

[21] "[A] passing insult that does not hinder the operation of [a] trial is probably not a sufficiently important matter to merit elaborate attack through use of the contempt powers." Dobbs, *supra* note 19, at 204.

C. Summary contempt proceedings must be reserved for cases where all necessity for a factual hearing has been excluded.

Johnson has denied the allegation, made in the show-cause petition (A. 3), that he addressed courtroom officials in an offensive manner (A. 16). His attorney stated that had Johnson been given a hearing, she would have produced eye-witnesses to establish Johnson's innocence of the contempt charge (A. 42).

A hearing on this factual conflict was necessary because the trial judge did not personally observe the alleged contemptuous act. The State's own documents report that following Johnson's remark, "... the Sheriff and Deputy Sheriff, Howard Hayward seized Robert Johnson and immediately carried him before the Circuit Judge, Marshall Perry, *and related to the Judge what had transpired*" (A. 3-4; emphasis added). Thus, the record which Judge Perry ordered introduced as part of the State's prosecution reveals that he learned of the remark because it was repeated to him, at the bench, by persons who had been standing elsewhere in the courtroom when the remark was made to them.

In such a case, where the trial judge "is informed [of alleged misbehavior] only ... by the testimony ... of others," summary procedures cannot be used to punish for contempt, *Savin, Petitioner*, 131 U.S. 267, 277 (1889), since a hearing is necessary to determine whether the accused committed contempt.[22] Moreover, even if the version of the event prepared two years later were accepted as accurate,

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[22] See also *In re Oliver, supra*, 333 U.S. at 275-76 (summary procedure permissible only where "all of the essential elements of the misconduct ... are actually observed by the court ..."). One commentator had stated that "it seems reasonably clear that a hearing would be required any time the contempt is predicated upon evidence obtained from other persons since in such cases the right to confront adverse witnesses would come into play." Dobbs, *supra* note 19, at 230 (footnote omitted).

and the judge himself had heard the remark, a contempt defendant should be given an opportunity to show that the judge misunderstood what was said, inaccurately heard the remarks, did not hear the entire event, and so on.[23]

D. Summary contempt proceedings must be reserved for exceptional circumstances constituting flagrant defiance of the court.

Even assuming, as Judge Perry averred two years after the events, that he actually overheard Johnson's comment, the question "what the hell do you mean go around" cannot reasonably be deemed to constitute such "flagrant defiance" of the court or such "an open threat" to its business that compliance with normal due process requirements would have demoralized the court's authority. *Cooke v. United States, supra,* 267 U.S. at 536; *Harris v. United States, supra,* 382 U.S. at 165. In particular, where a contemptuous remark is directed not at the trial judge but at sheriffs present in the courtroom, the remark does not constitute such a "flagrant defiance of the person and the presence *of the judge*" that only instant punishment could have protected the court from "demoralization". *Cooke v. United States, supra,* 267 U.S. at 536 (emphasis added).[24]

[23] See Dobbs, *supra* note 19, at 229: "Even if the external facts are clear because they took place in the presence of the judge, the issue of motive or intent is subject to exploration" (footnote omitted).

[24] The fact that Johnson's comment came as a response to the actions and words of Sheriff Ingram and Deputy Lott, who stopped him from walking across part of the courtroom normally open to the public, tends to confirm that the show-cause petition filed the next day (January 24, 1967) accurately reported that remark as a spontaneous utterance directed at one or both of the officers. Moreover, this report also finds confirmation in the action taken by Judge Perry immediately after the remark was made. For rather than exercising any power he might have felt vested in him to punish summarily for the alleged contempt, Judge Perry requested the District Attorney and the County prosecuting attorney to "file a petition citing and requiring Robert Johnson to show cause why he should not be punished for a contempt of the Circuit Court of Grenada County, Mississippi." (A. 4)

Summary contempt procedures, if at all permissible, must be reserved for "exceptional" and "unusual" circumstances. *Harris v. United States, supra,* 382 U.S. at 164, 167.[25] Significantly, this Court expressly identified as relevant to "the questions of law" involved in challenges to contempt procedures, whether the behavior punished constituted professional misconduct by an attorney. *Sacher v. United States,* 343 U.S. 1, 5 (1952). Summary contempt was held proper, under this standard, where an *attorney* assaulted a

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By ordering Johnson to show cause, *the trial court in effect conceded that the alleged contempt was not of the kind which could be punished summarily.* One commentator has clearly distinguished summary from plenary contempt proceedings as follows:

> There are traditionally two basic modes of proceeding in contempt cases. One way of proceeding is a summary hearing in which there are ordinarily none of the trappings of the usual criminal trial . . . .
>
> The plenary hearing is usually more formal and more extensive. *It is typically triggered by the filing and service of some document that operates to charge a contempt. A show cause order may be used for this purpose,* and it usually requires the defendant to appear at a time certain to "show cause" why he should not be held in contempt. Ordinarily, evidence is introduced to prove the alleged contempt . . . . [Dobbs, *supra* note 19, at 221 (footnote omitted; emphasis added)].

[25] Since the Fourteenth Amendment incorporates the rights to confront witnesses and to have effective assistance of counsel expressly written into the Sixth Amendment (*Pointer v. Texas,* 380 U.S. 400, 403 (1965); *Gideon v. Wainwright,* 372 U.S. 335, 341 (1963)), Constitutional rights accorded federal contempt defendants by virtue of the Sixth Amendment belong also to state defendants. This was made clear in *Mayberry v. Pennsylvania, supra,* where the Court said: "Whether the trial be federal or state, the concern of due process is with the fair administration of justice." In addition, since in *Harris v. United States, supra,* this Court characterized Fed. R. Crim. Procedure 42(a) as restating the limitations on non-statutory summary contempt power (382 U.S. at 165 n. 3), the procedural rights accorded federal contempt defendants in decisions (such as *Harris*) interpreting that Rule also attach to contempt defendants in state courts.

United States Marshal with a weapon in the courtroom, "with intent to obstruct the administration of justice";[26] or where *attorneys* engaged in long-continued conduct, despite warnings, which "was not such as merely to offend personal sensitivities of the judge" but actually "prejudiced the . . . conduct of the trial," and which conduct was described on appeal as "wilfully obstructive", "outrageous", and "abominable".[27]

By contrast to the continued "abominable" behavior subjecting knowledgeable attorneys to summary proceedings in *Sacher*, here summary conviction hangs on one remark made by a 20-year-old layman perhaps unschooled in the delicacies of speech with which law-enforcement officials in a courtroom should be addressed. Further, Johnson could not have intended his remark to interfere with the court's business to his advantage inasmuch as that single comment, which was not directed at the bench, did not occur during a trial or other proceeding in which he was the defendant. Clearly, the circumstances here (set forth in more detail in the statement above) belie any conclusion that the single comment allegedly made by Johnson could permit the extreme response of summary procedure—imposed on him some two years later—to withstand scrutiny under the due process clause. As a matter of fact, if Johnson made the remark at all, the record indicates that he made it as the result of a simple mistake—he had not heard the court's directions that caused the sheriff to tell Johnson to move.

II. THE RIGHT TO EVENHANDED JUSTICE

Judge Perry's failure to disqualify himself from the proceedings against Johnson, to schedule a hearing before another judge on Johnson's timely motion to recuse (A. 6),

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[26] *Ex Parte Terry, supra,* 128 U.S. at 298.

[27] *Sacher v. United States, supra,* 343 U.S. at 3-5 (one defendant was a layman acting as his own lawyer).

or even to hear the motion himself, infected Johnson's conviction with constitutional error.

Impartiality in the judicial process is a constitutional principle,[28] and "the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge . . . ." *Bloom v Illinois, supra,* 391 U.S. at 205, citing *In re Oliver, supra,* and *Offutt v. United States, supra.* Since "a fair trial in a fair tribunal is a basic requirement of due process" (*In re Murchison,* 349 U.S. 133, 136 (1955)), motions to avoid an allegedly biased tribunal "raise constitutional issues both relevant and essential" (*Holt v. Virginia,* 381 U.S. 131, 136 (1965). Johnson was therefore entitled to a hearing on his charge (supported by sworn affidavits from two attorneys) that elementary safeguards of justice would be denied him by trial before Judge Perry.

But there is much more at stake here than merely gaining the opportunity to pursue a motion raising important constitutional claims. "[O]ur system of law has always endeavored to prevent even the probability of unfairness . . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison, supra,* 349 U.S. at 136. In light of this "stringent rule," even if the hostility which Judge Perry was reported to have expressed against civil rights workers and against the group of lawyers to which Miss Wood (Johnson's attorney) belonged did not in fact carry with it personal prejudice against Johnson, the circumstances here impel the conclusion that Judge Perry was so personally enmeshed in matters involving the accused other than the contempt charge itself that only another judge could have afforded Johnson due process at trial.[29]

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[28] *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 148 (1968).

[29] "[W]here conditions do not make it impracticable, or where the delay may not injure public or private right," the judge in whose courtroom contemptuous conduct occurs may properly ask that one

The circumstances here which deprived the contempt proceeding "of the appearance of evenhanded justice which is at the core of due process"[30] are as follows:

> —The remark for which Johnson was summarily punished had been made in Judge Perry's courtroom. Since Judge Perry learned of that remark from courtroom officials and himself ordered Johnson's arrest for contempt, he could not later have approached the issue of Johnson's guilt or innocence of the contempt charge with a completely open mind and detached view. Because behavior viewed in the judge's mind as contempt strikes "at the most vulnerable and human qualities of a judge's temperament," there must be protection "against the arbitrary exercise of official power." *Bloom v. Illinois, supra,* 391 U.S. at 202; *Mayberry v. Pennsylvania, supra.* An independent judge would have provided such protection.
>
> —Almost immediately after the alleged remark by Johnson, Judge Perry held Johnson's then attorney, L. Lackey Rowe, Jr., Esq., in criminal contempt in connection with representation of Johnson. An independent judge would have heard the contempt charge against Johnson free of any preconceptions about the quality and integrity of Johnson's counsel or about the nature and persuasiveness of possible defenses to be offered by counsel.[31]

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of his fellow judges hear the charge. *Cooke v. United States, supra,* 267 U.S. at 539, quoted with approval in *Mayberry v. Pennsylvania, supra.*

[30] *Mayberry v. Pennsylvania, supra* (concurring opinion of Mr. Justice Harlan).

[31] The fact that Judge Perry, only ten days after summarily holding Johnson in contempt, summarily—and improperly—held in criminal contempt Johnson's then attorney (Martha M. Wood, Esq.) and two attorneys who merely signed Johnson's bill of exceptions, confirms that Judge Perry could not try the charge against Johnson with dispassion.

—Judge Perry initiated prosecution of Johnson by ordering his arrest for contempt and by directing preparation of the show-cause petition, and later convicted Johnson of the charge. An independent judge would not have so combined "the historically separate powers" of prosecutor and trial judge.[32]

—Judge Perry was a defendant in a suit brought by Johnson and others, charging racial discrimination in the selection of juries in Judge Perry's court.[33] Apart from the offense which any party may naturally take at allegations made in an official complaint against him, Judge Perry's involvement in this suit—in which an injunction issued against the defendants only two days before the 1969 contempt proceedings—makes his subsequent actions as trier of the criminal accusation against Johnson irreconcilable with the ideal of a dispassionate judiciary envisioned by the guarantee of a "fair trial in a fair tribunal".[34] An independent judge would not have had any motive to utilize the contempt proceeding to respond to unrelated personal grievances.

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[32] *In re Oliver, supra,* 333 U.S. at 278 (concurring opinion); *In re Murchison, supra,* 349 U.S. at 137 ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."). See also Dobbs, *supra* note 19, at 283: "In criminal contempts—and any courtroom misbehavior—the judge who acts as a prosecutor by initiating the charge should not, except where real necessities require it, be the judge who tries the case."

[33] *Johnson v. Gibbs,* N.D. Miss., No. WC 69-6 S, 1969. See p. 10, *supra.*

[34] According to the bill of exceptions filed below by Miss Wood (A. 38), in denying her motion for a hearing at the 9 a.m. proceedings on January 27, 1969, "Judge Perry stated that he had intended to give [Johnson] a hearing on the contempt charge . . . , but that since [Johnson] had the audacity to go to federal court (and whether Judge Perry meant by that the original removal order or the affirmative jury suit or both is not clear), he was not going to give him any hearing." (A. 40). Judge Perry subsequently denied having made that statement (see p. 12, *supra*).

Clearly, the facts of this case do not demonstrate any pressing need, in the administration of justice, why Judge Perry could not have been replaced by an independent colleague. Since conviction did not occur until more than two years after the alleged contempt, it cannot be seriously contended that the swift dispensation of justice prevented the case from being reassigned.

By virtue of Judge Perry's relationships to Johnson prior to the contempt proceeding—as the official who initiated his prosecution, as the judge who held his earlier attorney in contempt, and as a defendant who was successfully sued by Johnson—Johnson was deprived of his right to a decision-making process insulated from any forces or considerations other than the judgment of a detached jurist unswervingly focused on the issue of his guilt or innocence. These "are subtle matters, for they concern the ingredients of what constitutes justice," and "justice must satisfy the appearance of justice."[35] Johnson did not receive these due process guarantees. *Mayberry v. Pennsylvania, supra.*

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Mississippi should be reversed. Petitioner requests that reversal be accompanied with the statement that should the contempt charge against Johnson be further pursued in

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[35] *Offutt v. United States, supra,* 348 U.S. at 14.

the Circuit Court of Grenada County, the judge who imposed sentence on Johnson should invite another judge to try the charge.[36]

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[36] See *Cooke v. United States*, *supra*, 267 U.S. at 539.